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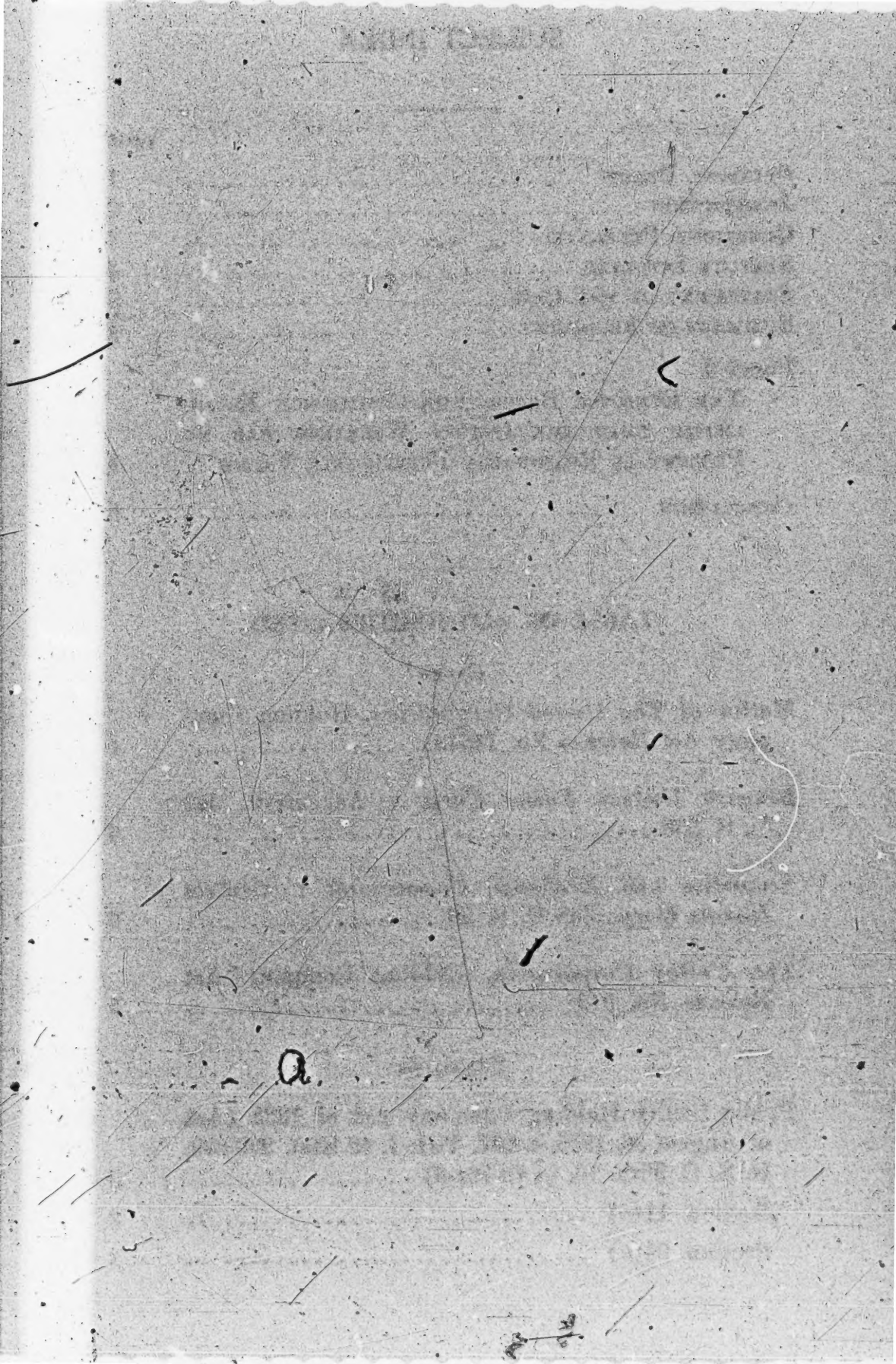

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 184

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,
Petitioner,

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, *et al.*,
Respondents.

BRIEF FOR THE UNITED CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 391) is reported at 203 F. (2d) 611. The Findings and Opinion of the Securities and Exchange Commission dated June 15, 1951 (R. 5),

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NOTE: For convenience, The United Corporation will sometimes be referred to as "United", the Securities and Exchange Commission as "the Commission", the Public Utility Holding Company Act of 1935 as "the Act" and The General Protective Committee for Holders of Option Warrants of The United Corporation as "the Committee".

supporting the Commission's Order of June 26, 1951 (R. 47), has not yet been officially reported but is set forth in the Commission's Holding Company Act Release No. 10614.

Jurisdiction

The Judgment and Decree of the Court of Appeals for the District of Columbia Circuit was entered on March 31, 1953 (R. 417). The petition for a writ of certiorari on behalf of The General Protective Committee for The Holders of Option Warrants of The United Corporation was filed on July 16, 1953. The jurisdiction of this Court has been invoked under 28 U. S. C. Sec. 1254(1), made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935.

Questions Presented

The Securities and Exchange Commission has approved, under Section 11(e) of the Public Utility Holding Company Act of 1935, a plan of a registered holding company to complete its transformation into a registered investment company. Among other things the plan provides for the cancellation of outstanding option warrants to purchase Common Stock of United.

The questions presented by this petition are:

1. Whether the Court of Appeals had jurisdiction to review that portion of the Commission's Order which provided for cancellation of the option warrants and conditioned consummation of that provision upon a district court's subsequent approval and enforcement thereof, although no enforcement proceeding had been instituted.

2. Whether the Commission had authority to direct cancellation of the option warrants.

3. Whether the Commission was justified in directing the cancellation of the option warrants upon the evidence before it.

Statute Involved

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803-838, 15 U. S. C. §§ 79-79z-6) are set forth at pages 1a to 4a of the appendix to the petition.

Statement of the Case

By its Judgment and Decree entered on March 31, 1953, the Court of Appeals affirmed the Order of the Securities and Exchange Commission, dated June 26, 1951, approving the Final Plan of The United Corporation, a registered holding company under the Public Utility Holding Company Act of 1935, to complete its transformation into a registered investment company. United's Plan provided, among other things, for cancellation of the outstanding 3,732,059 Option Warrants to purchase Common Stock of United. Each such warrant entitled the holder thereof to purchase one share of United Common Stock at a price of $27.50. Cancellation of the option warrants now awaits enforcement proceedings in the United States District Court.

As originally filed, United's Plan proposed that the warrants be exchanged for new warrants with different terms. The decision to propose that the warrants be accorded some recognition in the continuing enterprise was based upon their perpetual nature and not upon any determination that the warrants had any present or reasonably foreseeable value in dollars (R. 60). However, during the course of the proceedings on the Plan, it became apparent that the Commission's staff was opposed to the issuance of new warrants, even of limited duration.

Under these circumstances, and since, in the opinion of United's management and its expert advisers, the warrants had no present or reasonably foreseeable dollar value, United amended the Final Plan so as to provide for cancellation of the warrants.

The petition for certiorari herein is based, in substantial part, upon the contention that reduction of United's holdings of securities of statutory subsidiaries below the ten per cent level, subsequent to the Commission's approval of the Final Plan, deprived the Commission of the power to compel cancellation of the warrants. In June 1952, when United sought the Commission's approval for the disposition of all of its holdings of securities of South Jersey Gas Company, a statutory subsidiary, it was required by the Commission to stipulate that it would not at any time make the claim that such sale had deprived the Commission of jurisdiction to compel United to carry out the terms and conditions of the Final Plan (*Matter of The United Corporation*, Holding Company Act Release No. 11349).

Summary of Argument

The evidence showed that the option warrants had no present or reasonably foreseeable value. The attempt by a witness for the petitioner to spell out such value was based on highly speculative premises.

POINT I

The evidence before the Commission established that the option warrants had no present or reasonably foreseeable value.

Before United's Plan was amended to provide for cancellation of the warrants, William M. Hickey, President of United, testified on cross examination by counsel for the Commission that, even had there been no distribution of

Niagara Hudson Power Corporation Common Stock,* he did not believe there would have been any possibility of United's stock reaching the exercise price of $27.50 per share in the reasonably foreseeable future, and that any intrinsic value for the warrants was so remote as to render them virtually worthless. His sole basis for recognizing the warrants even on a *de minimis* basis was their perpetual nature (R. 58-60).

Alan W. Wallace, Vice President of Moody's Investors Service, a qualified independent expert, corroborated Mr. Hickey's testimony (R. 63-68).

The Committee sought to counteract this evidence through the testimony of Charles Tatham, Jr. Mr. Tatham's testimony was based upon a series of statistical comparisons which were without probative force because their claimed relation to the issue rested upon wholly conjectural and speculative assumptions. The fact that past records of certain securities of *other* companies over a period of years reveal abnormal fluctuations in value provided no basis whatsoever for a finding by the Commission that United's warrants have a present or reasonably foreseeable value. At most Mr. Tatham's statistics showed what was conceivably possible, not what was reasonably probable. Clearly if such a test were to be applied, no class of securities could ever be eliminated as worthless, and no reasonably informed determinations on valuation could ever be made.

In sustaining the Commission's claim that the warrants were without value, the Court of Appeals stated (R. 415):

> "While there is evidence to the contrary, the findings of the Commission with respect to the warrants are supported by evidence which we regard as substantial. * * *"

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* See *The United Corporation*, Holding Company Act Release No. 9431 (1949).

Under these circumstances, the Court's obligation to affirm the Commission's determination that the warrants should be canceled, was clear.

Securities and Exchange Commission v. *Central Illinois Corp.*, 338 U. S. 96 (1949);
Niagara Hudson Power Corp. v. *Leventritt*, 340 U. S. 336 (1951).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 30, 1953.